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May 20, 1999

EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
455 12th Street, SW
TW-A325
Washington, D.C. 20554

Re: CC Docket No. 96-115

In the matter of Implementation of the
Telecommunications Act of 1996
Telecommunications Carriers' Use of
Customer Proprietary Network Information and
Other Customer Information

Dear Ms. Salas:

As the Commission nears a decision on subscriber listing information (SLI), the Yellow Pages Publishers Association (YPPA) files this ex parte to, once again, respond to comments filed by the Association of Directory Publishers (ADP) and statement made by ADP to the Commission staff.

ADP has claimed that, inter alia: 1) the FCC should use an incremental or other cost-based formula for determining a benchmark price for SLI and the telephone industry should have filed cost data in this proceeding; 2) all SLI is essentially the same; 3) there should be one price for unlimited use of SLI; and 4) most local exchange carriers (LEC) have the same legacy systems, as the Bell operating companies (BOCs) were all part of the Bell telephone system. ADP is incorrect in all of its assumptions.

COMMISSION SHOULD NOT USE OF A COST-BASED FORMULA

In its March 30, 1999, May 4, 1999 and May 6, 1999 ex parte presentations, ADP contends that Congress actually intended the words "reasonable and non-discriminatory" to mean that the FCC should impose cost-based pricing for subscriber listing information.

ADP's interpretation ignores the plain language of the statute, the relevant legislative history, and long standing judicial statutory construction principles.

ADP claims that Congress knew that the word "reasonable" has been interpreted to mean cost-based pricing. Congress, however, knows the meaning of cost-based pricing, and, indeed prescribed exactly that in Section 252(d). Section 252(d)(1) states, in part, that "the just and reasonable rate for network elements.. (A) shall be (1) based on the cost..." (emphasis added). Similarly, section 252(d)(2)(A) states, in part, that reciprocal compensation shall not be "deemed just and reasonable unless-- (i) such terms and conditions provide for the mutual recovery by each carrier of the costs associated with the transport and termination..." (emphasis added).

In fact, the word cost appears more than 40 times in the text of the Telecommunications Act of 1996, and more than three dozen times in the Conference Report thereto. The word cost, however, does not appear in section 222(e), nor does the term appear in either the Conference Report or the House Commerce Committee Report explaining that section. It is a well-settled statutory interpretation principle that, within the same statute adopted or amended in the same piece of legislation, the use of a word in one provision and the omission of that word in another provision is intentional, and therefore imparts a different meaning to the two sections. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[1/] "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another."[2/]

Furthermore, Congress, in section 252(d), uses the phrase "just and reasonable" to describe the pricing allowed under that section. Indeed, that phrase mimics the phrase already found in Title II of the Communications Act.[3/] Section 222(e), however, uses the phrase "nondiscriminatory and reasonable." Presumably, Congress determined that rates for subscriber listing information under section 222(e) would be governed by something other than the Commission's traditional cost-based rate structure. Contrary to ADP's suggestion, Congress did not mandate that the pricing for subscriber listing information be based on costs.

1/ Moshe Gozolon-Peretz v. United States, 498 U.S. 395, 404; 11 S. Ct, 840, 846-47; 112 L. Ed. 2d 919 (1991).

2/ City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 338; 114 S. Ct, 1588, 1593; 128 L. Ed. 2d 302 (1994).

3/ See, *e.g.*, section 201; section 205.

Even the FCC's Notice of Proposed Rulemaking in this docket[4/] did not mention cost as a possible basis for computing reasonable and non-discriminatory rates. Indeed, cost information is not placed on the record in this proceeding because SLI pricing should not be cost-based.[5/]

From the legislative history and the FCC's NPRM, there is no reason that any cost data should be a part of this proceeding. Congress, did, however, specifically state that the value of the information is an important factor in determining reasonableness. The House Commerce Committee Report makes it clear that the listing information has some market value, and telephone companies are permitted to charge for listings based on that value. The report states that the subscriber list information provisions ensure "that the telephone companies that gather and maintain such data are compensated for the value of the listings."[6/] In spite of two written statements placed in the record during or after the debate on the Act, Congress clearly rejected a cost-based pricing determination for a value-based determination.

YPPA, in its April 13, 1998 ex parte, placed on the record information regarding the value of the listings to independent directory publishers. Using public information, and making some extrapolations from known subscriber listing prices, YPPA surmised that most independent publishers spent less than **one percent of revenue** on purchasing initial SLI.[7/] ADP claims that SLI is essential to publishing a directory.[8/] It does not seem unreasonable for such a purchase to cost a very small percentage of revenues. ADP did not put any information on the record to contradict YPPA's assumptions. If YPPA were to use ADP's argument, the FCC might assume that the real SLI cost as a percentage of revenues must be

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4/ In the Matter of Implement of the Telecommunications Act of 1996; Telecommunications Carrier's use of Customer Proprietary Network Information and Other Customer Information, *Notice of Proposed Rulemaking*, CC Docket 96-115, FCC 96-221, released May 17, 1996.

5/ Assuming, arguendo, the FCC uses cost as a factor in determining reasonableness, fully distributed costs, and not incremental costs, should be considered the relevant cost factor.

6/ H.R. Rpt. No. 104-204, Part I, 104th Cong., 1st Sess. at p. 89 (1995) (emphasis added).

7/ YPPA proposes that the FCC use a standard of reasonableness based, in part, on a percentage of revenue generated by the use of the information. Unlike a cost-based formula, this type of proposal is supported by the legislative history. YPPA does not claim to know the correct percentage of revenues to use. For initial dumps of SLI, however, based on YPPA's April 13, 1998 ex parte and a simple business analysis, it appears that two percent of revenue is not unreasonable.

8/ YPPA notes that some directory publishes publish SLI without the benefit of SLI obtained from a LEC. *See, Hearing on H.R. 2652, the "Collections of Information Antipiracy Act" before the House Judiciary Committee, Courts and Intellectual Property Subcommittee*, 105th Congress (February 12, 1998) (Testimony of William Hammack, President, The Sunshine Pages, representing the Association of Directory Publishers).

even less than one percent, or ADP surely would have put other information on the record.[9/]

ALL SLI IS NOT THE SAME

ADP would have the FCC believe that all SLI is the same. Nothing could be further from the truth. For example, the product which BellSouth provides at four cents a listing is not ready for publishing. It is essentially a raw dump of the data from the telephone company with little or no enhancements. The product that GTE provides is camera ready, saving the independent publisher much time, effort and money. GTE charges significantly more for this camera-ready product. Any FCC guidelines or enforcement must recognize the value-added features that certain LECs put into their SLI. The FCC must recognize that the independent publisher would have to either create systems to perform some of the value-added enhancements, or outsource those functions. Either way, the independent publisher is avoiding significant expense, which should be reflected in the SLI price.

There is no easy way to create a hard and fast flat price ceiling that can take into account all the different value-added enhancements available. ADP's request that there be a regulatory price ceiling is not workable for the real world.

ADP continues to use BellSouth's price in Florida as a standard for reasonableness. Indeed, the Florida Commission determined that four cents per listing is a reasonable price for an initial, unenhanced data dump. That same Commission in that same proceeding also determined that $1.50 or $2.00 per listing (depending on the update product) is reasonable for updates. In order words, the Florida Commission balanced the listing prices for an overall cost by creating a relatively low initial subscriber listing cost with the high, more valuable, update cost.[10/] It is essential that the FCC recognize that states, such as Florida, balance low initial SLI prices with other factors, such as higher update prices.

MULTIPLE USE OF SLI SHOULD BE PRICED DIFFERENTLY THAN SINGLE USE

ADP continues to claim that single use of SLI and multiple uses of SLI should be priced the same. That argument ignores the basic principle of licensing databases. As

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[9/] YPPA would not be so crass as to suggest that is the case. YPPA believes that such information should be part of the complaint process, wherein an independent publisher can show that SLI costs are so high and consume such a large percentage of revenue that such prices are unreasonable. Indeed, a full-blown cost vs. revenue analysis has not been asked for by the FCC in its NPRM, and YPPA does not expect that such an analysis will be performed in a rulemaking such as this.

[10/] YPPA notes that the real value of updates is the ability to sell advertising to new businesses, and not to actually publish the directory (although some update products are used for publishing directories). The value of updates, therefore, is greater than the value of initial SLI.

YPPA argued in its February 27, 1998 ex parte, logical and business principles dictate that multiple uses should be more expensive than single uses. In fact, this is consistent with the practices of other companies that license or sell listings of information.

Using the same data multiple times means that there is more value in the data for the multiple user. As noted above, the House Committee Report was clear that the subscriber list information provisions ensure "that the telephone companies that gather and maintain such data are compensated for the value of the listings."[11/] Charging more for additional uses is standard licensing practice in many fields. If an individual purchases software for installation on one computer, the software license is one price. If it is purchased for an office for installation on a series of computers, the price is generally much higher, even though the cost to the manufacturer is exactly the same. The same principle is true if a publisher purchases a photograph. The photographer will usually sell it for one price for a single use, and a higher price for multiple or unlimited use.

If two publishers use the same subscriber list information, and publisher A uses it once and publisher B uses it multiple times, it is reasonable for publisher B to pay for a greater portion of the cost of gathering and maintaining the database. The multiple user is getting much more value and use than the single user, and should therefore pay a higher price.

ALL LEC SYSTEMS ARE NOT THE SAME

ADP claims that all LEC or at least all BOC systems are essentially the same, so costs to produce SLI should be about the same. While this may have been partially true for the Bell system 30 years ago, it is definitely not true today. Even before AT&T was broken up, the individual telephone operating companies stopped purchasing equipment as a bloc. At the time Section 222(e) was enacted, there were 20 different telephone companies operating under the umbrella of the seven Regional Bell operating companies (RBOCs). When AT&T was broken up, the RBOCs were divided into seven geographically contiguous groups based on such factors as the number of customers and shareholder value, not whether the individual telephone companies had the same operating systems.

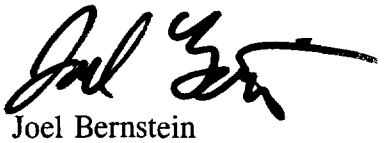
In the fifteen years since the breakup of AT&T, there has been monumental changes in technology and systems. Surely, each telephone company purchased equipment and upgrades from a variety of vendors to suit the individual needs. If ADP's proposition were correct, once an operational support system (OSS) solution is found for one company in one state, it can be immediately and seamlessly exported throughout that BOC, and to other RBOCs. Obviously, that is not the case.

11/ H.R. Rpt. No. 104-204, Part I, 104th Cong., 1st Sess. at p. 89 (1995) (emphasis added).

SUMMARY

ADP basically claims that Section 222(e) needs a one-size-fits-all rule to become effective. YPPA knows that a one-size-fits-all rule will lead to more litigation, confusion and delay. The truth is that Section 222(e) has been the law of the land for more than three years. Where an independent publisher believes that a telecommunications carrier is not providing SLI on reasonable and non-discriminatory rates, terms and conditions, there is a complaint process whereby the FCC will resolve the issue. At least one independent publisher has already taken advantage of the complaint process to attempt to redress a perceived violation of Section 222(e). That is the way the statute was meant to work. In that case, and in any other brought before the FCC, the FCC must make a determination of that the rates, terms and conditions for SLI is or is not reasonable and is or is not discriminatory. The FCC must base its decision, at least in part, on the value of the SLI.

Sincerely,



Joel Bernstein
Counsel for the Yellow Pages Publishers Association

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